No. 20,827

IN THE

United States Court of Appeals

For the Ninth Circuit

K. B. & J. YOUNG'S SUPER MARKETS, INC., *Petitioner*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

BRIEF FOR PETITIONER

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JURISDICTIONAL STATEMENT

This is a petition by an employer to review and set aside a Decision and Order of the National Labor Relations Board. (R. 52, 54.) The National Labor Relations Board (hereinafter, "NLRB") has filed a cross petition for enforcement of its order. (R. 57.) Jurisdiction of this Court rests upon Sections 10(e) and 10(f) of the National Labor Relations Act (29 U.S.C. § 160(e), et seq.).

STATEMENT OF THE CASE

In April, 1964, William Young and Charles John Young, who are brothers, purchased from Hob Nob Stores, Inc., d/b/a Kelley's Markets, three retail

supermarkets in Bakersfield, California. Hob Nob operated thirty other supermarkets and was part of a large corporate complex. (Tr. 243-244.) The Youngs organized a corporation, petitioner herein, to operate the stores. (Tr. 283.) At the request of the Youngs, Hob Nob terminated its employees. (Tr. 247.) Hob Nob closed the stores. (Tr. 249.) The stores remained closed for a day and reopened the following day under the Youngs' management. The Youngs did not hire any former Hob Nob employees. The Youngs hired one former Hob Nob grocery department supervisor, but none of the Hob Nob meat department supervisors. (Tr. 355.)

Hob Nob had a collective bargaining agreement with Butchers Union Local 193 at the time of the sale. The agreement covered the three stores purchased by the Youngs and was effective until January, 1965. (G.C. Exh. No. 2.)

After the sale Local 193 requested petitioner to honor the agreement. Petitioner refused to do so.

A consolidated complaint (R. 10) filed January 27, 1965, charged that petitioner caused Hob Nob to discharge its employees, that petitioner failed "to recall" the employees, that petitioner was the "successor" to Hob Nob within the meaning of the National Labor Relations Act (29 U.S.C. § 151, et. seq.; hereinafter, "the Act"), that petitioner failed to bargain with Local 193 after purchasing the three stores, and that by such acts, petitioner violated Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the Act. The complaint also charged petitioner with three incidents of individual

discrimination in violation of Sections 8(a)(1) and 8(a)(3) of the Act.

An amendment to the consolidated complaint (R. 19) alleged that petitioner and Jack Young's Supermarkets, another corporation operating a supermarket in Bakersfield, were a "single employer" within the meaning of the Act.

Petitioner denied all the material allegations of the consolidated complaint and the amendment to it. The matter went to hearing before an NLRB trial examiner in Bakersfield, on May 3 and 4, 1965.

The trial examiner found that petitioner caused Hob Nob (Kelley) to discharge its employees "in order to evade and escape its obligations as a successor to Kelley to recognize and bargain with the Union and to honor and apply its unexpired bargaining agreement." (R. 36, 37.) He further found that petitioner refused to bargain in good faith with Local 193, that petitioner discriminatorily refused to hire Norma Newton, an ex-Hob Nob employee, and that petitioner discriminatorily discharged two of its employees, Jack Baldwin and Imogene Brewton. He concluded that petitioner had violated Sections 8(a)(1), 8 (a)(3) and 8(a)(5) of the Act. (R. 39.) He also concluded that petitioner and Jack Young's Supermarkets were a single employer. (R. 35.) The trial examiner recommended that petitioner be ordered to offer immediate reinstatement to all of Hob Nob's former employees in the appropriate unit, that petitioner be ordered to offer reinstatement to Jack Baldwin and to Imogene Brewton, that petitioner be ordered to make whole

Hob Nob's former employees, and Baldwin and Brewton "for any loss of pay they may have suffered as a result of the discrimination against them", and that petitioner be ordered to bargain with Local 193 as the representative of its employees. (R. 40.)

In a brief order the NLRB adopted the recommendations of its trial examiner. (R. 52.)

This petition followed.

STATUTES INVOLVED

Section 7 of the National Labor Relations Act (29 U.S.C. § 157) provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides that

> "it shall be an unfair labor practice for an employer—
>
> "(1) To interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7;"
>
> * * * * *

"(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."

* * * * *

"(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

SPECIFICATION OF ERRORS RELIED ON

1. The NLRB erred in failing to find whether petitioner was the successor of Hob Nob within the meaning of the Act.

2. If a finding may be implied that petitioner was the successor of Hob Nob within the meaning of the Act, the finding is in error.

3. The NLRB erred in finding that petitioner caused Hob Nob to discharge its employees in order to evade and escape petitioner's obligations as a successor to Hob Nob to recognize and bargain with Local 193 and to honor and apply its unexpired bargaining agreement.

4. The NLRB erred in finding and concluding that petitioner was legally obligated to recognize and bargain with Local 193 as the collective bargaining representative of petitioner's employees and that petitioner unlawfully refused to do so.

5. The NLRB erred in finding that petitioner discharged Imogene Brewton because of her Union and concerted activities.

6. The NLRB erred in finding that petitioner discharged Jack Baldwin because of his Union affiliation and activities.

7. The NLRB erred in finding that petitioner denied Norma Newton employment because of her refusal to withdraw from the Union, or otherwise.

8. The NLRB erred in finding that petitioner and Jack Young's Supermarkets constituted a single employer within the meaning of the Art.

9. The NLRB erred in finding and concluding that petitioner engaged in and/or is engaging in unfair labor practices within the meaning of Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the Act.

10. The NLRB erred in ordering petitioner to take the action set forth in the Trial Examiner's Recommended Order (R. 40), there being no proper basis for the Order and the Order not being necessary to effectuate the policies of the Act.

11. The NLRB erred in fashioning remedies based on petitioner's refusal to hire the former Hob Nob employees. Petitioner was not charged with having refused to hire the Hob Nob employees and petitioner was thereby denied due process of law.

QUESTIONS PRESENTED

1. Where a small non-unionized firm purchases part of the operations of a larger unionized firm, and the purchaser does not employ any of the employees

of the seller, is the purchaser a successor within the meaning of the Act?

2. Is it an unfair labor practice for the purchaser of a unionized business to request the seller of the business to terminate the seller's employees upon the sale so that the purchaser will be free to hire its own employees?

3. Does it effectuate the policies of the Act to require the purchaser of a unionized business to offer "reinstatement" to the employees of the seller where the employees of the seller did not apply to the purchaser for employment and were not hired by it?

4. Is there substantial evidence to support the findings and conclusions of the NLRB that petitioner was guilty of acts of discrimination against Norma Newton, Jack Baldwin, and Imogene Brewton?

5. Is there substantial evidence to support the findings and conclusion of the NLRB that petitioner and Jack Young's Supermarkets were a single employer within the meaning of the Act?

SUMMARY OF ARGUMENT

Where a small, non-unionized firm purchases part of the operations of a large, unionized firm, and the purchaser does not employ any of the employees of the seller, the purchaser is not a successor within the meaning of the Act. The essential element is the employer-employee relationship. It is not an unfair labor practice for the purchaser of a unionized busi-

ness to request the seller of the business to terminate the seller's employees upon the sale so that the purchaser will be free to hire its own employees. The purchaser of a business is free to hire its own employees. If as is the case, petitioner was not a successor and was free to hire its own employees, and did so, the representative status of the union did not continue after the sale. There is no basis for a requirement that petitioner reinstate the employees of the seller unless the seller's employees applied to petitioner for employment and were refused because of their union affiliation or activity. The seller's employees did not apply. There is a lack of substantial evidence to support the findings and conclusions of the NLRB as to the alleged instances of individual discrimination and as to the single employer. Speculation, surmise, conjecture or innuendo are not evidence.

ARGUMENT

I. WHERE A SMALL, NON-UNIONIZED FIRM PURCHASES PART OF THE OPERATIONS OF A LARGE, UNIONIZED FIRM, AND THE PURCHASER DOES NOT EMPLOY ANY OF THE EMPLOYEES OF THE SELLER, THE PURCHASER IS NOT A SUCCESSOR WITHIN THE MEANING OF THE ACT.

It seems undisputed that Hob Nob was a large firm (Tr. 243-244), that its employees were unionized, that petitioner was (and is) a small firm (Tr. 95-96), that it was not unionized, and that it did not hire any of Hob Nob's employees (Tr. 356-358).

If petitioner was a successor within the meaning of the Act, it may have been obligated to bargain with

Local 193, the collective bargaining representative of the employees of Hob Nob, its predecessor. *Cruse Motors,* 105 N.L.R.B. 242, 247 (1953). Also, under recent decisions discussed *infra,* it may have been bound to arbitrate grievances arising under the Hob Nob-Local 193 collective bargaining agreement had Local 193 requested it to do so.

If petitioner was not a successor, it was not obligated in either respect.

In *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 84 S.Ct. 909 (1964), a small unionized firm merged with a larger non-unionized one. There was a "wholesale transfer" of the smaller firm's employees to the larger firm's plant. The Supreme Court ruled that "the disappearance by merger" of an employer who had a collective bargaining agreement with a union did not "automatically terminate all rights of employees covered by the agreement, and . . . in appropriate circumstances . . . the successor employer may be required to arbitrate with the union under the agreement". (376 U.S. 543, at 548.) The Court stated that "we do not suggest any view on the questions surrounding a certified union's claim to continued representative status following a change in ownership". (376 U.S. 543, at 551.) In the present case, Local 193 was not certified. (Tr. 274-275.)

In two later decisions, *Wackenhut Corp. v. Plant Guard Workers,* 332 F.2d 954 (C.A. 9, 1964), and *Steelworkers v. Reliance Universal,* 335 F.2d 891 (C.A. 3, 1964), the *Wiley* doctrine was applied by Courts of Appeal to purchase, rather than merger,

situations. In both cases substantially all the employees of the seller became employees of the buyer.

We are dealing here with a question of representation, not contract application. The Trial Examiner did not recommend, and the NLRB did not order, that petitioner apply the Hob Nob-Local 193 collective bargaining agreement. Local 193 did not file exceptions to the Trial Examiner's Decision. The General Counsel's Cross-Petition for Enforcement (R. 57) does not seek modification of the NLRB order.

In any event, representation or contract application, a purchaser of a unionized business is not *ipso facto* a successor employer. The essential element is the employee-employer relationship. *N.L.R.B. v. Alamo White Truck Service,* 273 F.2d 238, 242 (C.A. 5, 1959). That is as it should be. Petitioner's employees never worked for Hob Nob. In matters of representation, they should be free to make their own choice. Section 7 of the Act so provides. (29 U.S.C. § 157.)

The trial examiner asked at the conclusion of the hearing: "Are you still a successor, although you have none of the employees of the predecessor?" (Tr. 410.) There is no precedent for an affirmative answer.

In a number of recent cases the NLRB has required a purchaser to bargain with the representative of the seller's employees. In all the cases the seller's employees became the buyer's employees. In most of the cases there was no change in supervision. *Chemrock Corporation,* 151 NLRB No. 111 (1965); *Randolph Rubber Co.,* 152 NLRB No. 46 (1965); *Hemisphere Progressive Corp.,* 154 NLRB No. 65 (1965); *Para-*

mount Paper Products, 154 NLRB No. 89 (1965); *Sinko Mfg. & Tool Co.,* 154 NLRB No. 117 (1965); *West Suburban Transit Lines,* 157 NLRB No. 77 (1966); and *William E. McClain,* 158 NLRB No. 18 (1966).

However, where the seller's employees did not become the buyer's employees, the result has been to the contrary. *Triumph Sales, Inc.,* 154 NLRB No. 71 (1965); *San Francisco Metal Products,* 155 NLRB No. 27 (1965).

In *Triumph Sales, Inc.,* supra, the Board stated as follows:

> "On the basis of the record as a whole, we are satisfied that the 'employing industry' is not essentially the same and therefore that Triumph is not a successor to Bristlo. Thus, of the 7 employees of Bristlo, only 3 were working for Triumph when Triumph began operations as licensee of White Front, and Triumph has hired 17 additional employees; Triumph's employees work under supervision different from that of Bristlo's employees; Bristlo operated 7 liquor departments while Triumph is operating 11 departments, including 3 new locations and a Bristlo department which had been closed; and Triumph has added a line of gourmet foods not previously handled by Bristlo."

In *McGuire v. Humble Oil & Refining Co.,* ..... F.2d ..... (C.A. 2, Jan. 31, 1966), 53 CCH Labor Cases § 11,026), a small unionized firm sold its assets to a larger unionized firm. Thirteen of the seller's twenty-four employees were hired by the buyer. The Second

Circuit holds that the buyer was not required to arbitrate a dispute arising under the bargaining contract the seller had with the union which represented the seller's employees. The NLRB ruled earlier that the union which represented the buyer's employees became the exclusive bargaining representative of the seller's former employees. *Humble Oil & Refining Co.,* 153 NLRB No. 111 (1965).

The *McGuire* Court does not decide whether it would have required arbitration if the buyer had been non-unionized. It states that "we think it better to avoid crossing that bridge until it is necessary to do so". (53 LC, p. 16,183.)

Petitioner now asks this Court to cross the bridge in a representation setting.

While crossing, petitioner asks this Court to have in mind that a bargaining order is strong medicine, that its potential effect on employees' Section 7 rights must not be overlooked, and that the Act protects the right of employees to join or refrain from joining a labor organization. *NLRB v. Flomatic,* 347 F.2d 74, 78 (C.A. 2, 1965).

II. IT IS NOT AN UNFAIR LABOR PRACTICE FOR A PURCHASER OF A UNIONIZED BUSINESS TO REQUEST THE SELLER OF THE BUSINESS TO TERMINATE THE SELLER'S EMPLOYEES UPON THE SALE SO THAT THE PURCHASER WILL BE FREE TO HIRE ITS OWN EMPLOYEES.

The NLRB failed to make a finding on successorship. In a footnote to its decision (R. 52) it states that "The Trial Examiner's recommendation that the

Respondent be ordered to bargain with the Union is based in part on his finding, with which we agree, that the Respondent is the successor to Kelley's Supermarkets". The Trial Examiner's finding was that "Respondent caused Kelley to discharge its employees in order to evade and escape its obligations as a successor to Kelley to recognize and bargain with the Union and to honor and apply its unexpired bargaining agreement". (R. 37.)

The NLRB must make detailed findings of fact and conclusions of law and give basic reasons for decision on all material issues raised. (29 C.F.R. 101.11, 101.12, 102.45, 102.48.) A finding that petitioner took action to "evade and escape its obligations as a successor" is not responsive to the controverted allegation in the Consolidated Complaint that petitioner "is and has been, since on or about April 21, 1964, the successor to Kelley's". (R. 10, Paragraph G.) The absence of required findings is fatal to the validity of an administrative decision regardless of whether there may be evidence to support proper findings. *Anglo Canadian Shipping Co., Ltd. v. Federal Maritime Comm.,* 310 F.2d 606, 617 (C.A. 9, 1962).

The Trial Examiner concluded that petitioner's causing Kelley to discharge its employees "in order to evade and escape its obligations as a successor" was "discrimination against Kelley employees violative of Section 8(a)(1) and (3) of the Act". (R. 37.) His conclusion presents the question whether the purchaser of a unionized business may request the seller to terminate its employees so that the purchaser will

be free to hire its own employees. The question must be answered in the affirmative.

For focus there is the uncontroverted testimony of Frank Johnson, president of Hob Nob (Tr. 246):

> "Trial Examiner: I take it, Mr. Johnson, it was a part of the understanding that you had with them when they bought the business, was it, that you would terminate your help. They would be present to hire whomever they pleased. Is that right or wrong?
>
> The Witness: That is right."

An employer has a right to consider objectively and independently the economic import of unionization of his shop and to manage his business accordingly. *N.L.R.B. v. New England Tank Industries,* 302 F.2d 273, 276 (C.A. 1, 1962); *Jays Foods, Inc.,* 292 F.2d 317, 320 (C.A. 7, 1961).

In *Textile Workers v. Darlington Mfg. Co.,* 380 U.S. 263 (1965), the Supreme Court holds that a proposition that a single businessman cannot choose to go out of business (for whatever reason) if he wants to would represent a startling innovation without support in either statute or judicial precedent. So would a proposition that a purchaser of a business must retain the employees of the seller.

Darlington recognizes that some employer decisions are so peculiarly matters of management prerogative that they may be made without violating the Act, no matter what the motivation, and that the Act does not compel one to become or remain an employee or an employer.

In *Piasecki Aircraft Corporation v. N.L.R.B.,* 280 F. 575 (C.A. 3, 1960), Piasecki (the buyer) requested Bellanca (the seller) to terminate its employees upon the sale so that Piasecki would be free to hire its own employees. Later the Bellanca employees vigorously applied to Piasecki for employment and were just as vigorously rebuffed. The application—failure to hire aspect of the case will be discussed *infra.* The point here is that the Union contended that the termination of employment of the Bellanca workers was by reason of Piasecki's insistence and therefore was an unfair labor practice in violation of Sections 8(a)(1) of 8(a)(3) of the Act. The NLRB rejected the union's contention. The rejection is not disturbed by the Court. (280 F. 575, 589-590.)

In *Union Texas Petroleum,* .....F.2d ....., 53 LC paragraph 11,259 (C.A.D.C., May 24, 1966), affirming 153 NLRB No. 71 (1965), a non-unionized buyer who requested a unionized seller to discharge its employees and shut down its plant upon the sale did not violate Sections 8(a)(1) and 8(a)(3) of the Act. None of the seller's union employees were subsequently hired by the buyer.

It is submitted that a purchaser, for whatever reasons, may elect to hire a new work force. One of the reasons may be a desire to avoid unionization. There is no requirement in the Act that an employer like unions.

III. THERE IS NO BASIS FOR THE NLRB ORDER THAT PETITIONER REINSTATE HOB NOB'S EMPLOYEES.

The Trial Examiner recommended and the NLRB has ordered that petitioner offer reinstatement to all the former Hob Nob employees and that petitioner make them whole for any loss of pay suffered by reason of their discharge by Hob Nob. (R. 40, 52.) In the footnote to its decision, the NLRB states this would follow even if petitioner is not a successor, relying on *Piasecki Aircraft Corporation v. NLRB,* supra. *Piasecki* involves a discriminatory refusal to hire.

In *Piasecki* the Bellanca employees vigorously applied to Piasecki for employment. The evidence showed that Piasecki originally planned to hire all of Bellanca's employees in the unit, that the union representing Bellanca's employees advised Piasecki that Bellanca employees were available for employment (280 F.2d 575, at 579), that the union submitted written employment applications to Piasecki for 135 out of 139 employees in the unit (581), that when the applicants appeared at a hotel designated by Piasecki as the place for employment interviews, the front door was kept locked so that they could not enter (582), that all the applicants appeared at the plant on the first day of operation by Piasecki and offered themselves for employment, but found the door locked (582), and that the union secured newly signed authorization cards for 138 of the 139 employees in the unit (586).

The present case is quite different.

There is no allegation in the Consolidated Complaint (R. 10) except as to Norma Newton, that petitioner unlawfully refused to hire former Hob Nob employees who applied to it for employment. The allegation is that petitioner "since April 20, 1964, has failed and refused and has continued to fail and refuse, to recall said employees." (R. 10, paragraph 18.) "Recall" is defined in *Webster's Twentieth Century Dictionary* (1955) as meaning "to call back" and in this setting is synonymous with reinstatement.

The concept of a discriminatory refusal to hire is a different concept from a discriminatory discharge and refusal to reinstate. *NLRB v. Textile Machine Works,* 214 F.2d 929, 932 (C.A. 3, 1954); *Piasecki Aircraft Corp. v. NLRB,* supra, at 590-591.

It is improper to require petitioner to take affirmative action on the basis of having committed an unfair labor practice (discriminatory refusal to hire) not complained of. Cf. *Neuhoff Bros.,* 151 NLRB No. 103 (1965).

Further, petitioner can not be guilty of unlawful practices in refusing employees something which they had not in fact asked for. *NLRB v. Textile Machine Works,* supra, at 933. This leads to the question whether the former Hob Nob employees in fact asked petitioner for employment, or in the alternative whether there was conduct by petitioner such as the *Piasecki* locked doors which prevented them from doing so.

The record shows that although Hob Nob's employees were instructed to file applications for employment by petitioner if they desired to work for petitioner (Tr. 204), none of them except Forbes Barnum and allegedly, Norma Newton, ever pursued their interest in such employment. Barnum was the only Hob Nob employee who filled out an application, and he was offered a job. (Tr. 204.) He decided to go to work elsewhere. (Tr. 207.)

Benton Lee Hart, a former Hob Nob employee, testified that he was told that if he desired employment by petitioner, to apply. (Tr. 140.) He was told that petitioner would be non-union. (Tr. 137.) He heard at a union meeting that petitioner "had hired all butchers", but on cross-examination, he admitted that he "was not interested" in what he heard "because it was just hearsay". (Tr. 142-143.)

Donald Hinds, another former Hob Nob employee, testified that on the evening of his last day at work, he saw William Young, who told him petitioner had all its qualified meat cutters. (Tr. 147.) Young was very busy at the time and "had a bunch of papers in front of him". (Tr. 149.) Hinds also testified that "either the following day or the second day after the sale of the stores", there was a meeting of the former Hob Nob employees at the Local 193 office, and the employees discussed "the condition of sale, the fact that they were going to be—right then they were supposed to be non-union—a non-union store—and what the chances of the future there might be". (Tr. 147.)

Argus Turner, a third former Hob Nob employee, testified that petitioner's meat supervisor told him that petitioner "had plenty of butchers". (Tr. 200.)

Hart, Hinds and Turner, along with the other Hob Nob employees, did not apply for employment. No one prevented them from doing so.

The statement attributed to petitioner that it would be non-union was not a violation of the Act. *NLRB v. New England Tank Industries,* supra, 302 F.2d 273, 276. Nor were the statements that petitioner had the butchers it needed. If at the time, petitioner thought that the number of butchers it had arranged for was sufficient, there was no reason why it should have withheld that information. Petitioner was not obliged to give preference to the former Hob Nob employees over other applicants for employment. *Bedford-Nugent Corp.,* 151 NLRB No. 26 (1965).

A discriminatory refusal to hire was not complained of, and as noted, such a theory finds no evidentiary support. Therefore, there is no basis for the requirement that petitioner offer reinstatement to the former Hob Nob employees. It is a probable result that such action would displace petitioner's employees.

NLRB action is not insulated from judicial review where it has applied a remedy it claims it has worked out on the basis of its expertise, without regard to the circumstances which may make its application to a particular situation oppressive and not calculated to effect a policy of the Act. *NLRB v. Flomatic Corp.,* supra, 347 F.2d 74, at 77.

IV. THERE IS A LACK OF SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDINGS OF INDIVIDUAL DISCRIMINATION AND THE FINDING OF THE SINGLE EMPLOYER.

Even after discounting all explanations offered by an employer, the NLRB still must find unlawful motivation through substantial evidence in order to conclude that an employer violated Section 8(a)(3). *Riggs Distler & Co., Inc. v. NLRB,* 327 F.2d 575, 55 LRRM 2145 (C.A. 4, 1963); *NLRB v. Coca-Cola Bottling Co.,* 333 F.2d 181, 56 LRRM 2562 (C.A. 7, 1964).

Conclusions based on surmise or conjecture can not stand. *NLRB v. Covington Motor Co.,* 344 F.2d 136, 58 LRRM 2811 (C.A. 4, 1965); *NLRB v. Deerfield Screw Products Co.,* 329 F.2d 558 (C.A. 6, 1964).

Nowhere is this better demonstrated than as to the findings and conclusions regarding Jack Baldwin.

Baldwin

There is no evidence of union activities by Baldwin while he was in petitioner's employ.

At first Baldwin was employed at Jack Young's Supermarket (herein, "Jack Young"), located on Brundage Lane in Bakersfield. There is no evidence of union activities by Baldwin while he worked there.

There was a picket line of another union at Jack Young's. Cleo Thompson, the meat supervisor, asked Baldwin if he wanted to cross the picket line. (Tr. 153.) Thompson said that "there wasn't really any problem, if I wanted to go across the picket line I could go, and if I didn't want to go across the picket

line I could go to the other store". (Tr. 154.) Baldwin went to the other store and to work for petitioner. The trial examiner saw this as "but another example of Respondent's connivance with Jack Young in meeting the thrust of union organization in the Brundage Store" and as "further indicative of Respondent's collaboration with Jack Young in combatting unionism." (Trial Examiner's Decision, pp. 8-9.)

Since there is no evidence in the record that Jack Young was combatting unionism, the Trial Examiner's views border on light fantasia. During all of 1964 there was a collective bargaining agreement between Jack Young and Local 193 (Tr. 12), and at the time of the hearing the parties were negotiating for a new one (Tr. 50-51).

Arranging work for Baldwin elsewhere, thereby respecting his decision not to cross the picket line, is hardly evidence of discrimination.

Baldwin was later promoted from meat cutter to head meat cutter. (Tr. 187.) His promotion is hardly evidence of discrimination either.

Still later, Baldwin left petitioner's employ.

The Trial Examiner could not understand why Baldwin was let go while his assistant, an apprentice, was retained. The explanation is simple:

(1) A head meat cutter has administrative and supervisory duties an ordinary meat cutter does not have. (Tr. 336-339, 374.) The difference is recognized in the Local 193 collective bargaining agreement, which provides that "journeymen meat cutters per-

forming head meat cutters responsibility" shall be paid accordingly. (G. C. Exh. No. 2, p. 28.)

(2) While Baldwin was a fairly decent meat cutter (Tr. 312), he was a poor head meat cutter (Tr. 375). He was let go. An experienced head meat cutter took his place.

(3) The apprentice was retained as an assistant because apprentices are by nature assistants.

There is little, if any evidence that Baldwin's replacement was non-union. Baldwin testified that "from what I understand, he *is* not" a union member (Tr. 165), but there is no showing of the basis for such understanding.

The case for discrimination against Baldwin is flimsy. Bill Sing, a grocery department manager who had no supervision over the meat department (Tr. 182-183, 261), allegedly asked Baldwin if he was a union member. (Tr. 156-157.) It is difficult to see how or why that was discriminatory.

Brewton

The case for Imogene Brewton turns on her testimony that she was requested to work at Jack Young's store on Brundage Lane so that Charlene Pappin, a Jack Young's employee, could take her place at petitioner's Oildale (Roberts Lane) store and thereby, avoid having to become a union member. (Tr. 103; see also, for identification of Pappin as "the other girl" mentioned by Brewton, Tr. 305-306, 396, 397, 407.)

Union President Charles A. Hohlbein testified, however, that while at Jack Young's, Pappin *did* join the union. His testimony was this (Tr. 384):

> "And he took the application. He went in and talked to the girl and she came back out of the meat department and told me that she would have this filled out and for me to pick it up tomorrow, which she done."

The Trial Examiner found that testimony of Brewton's inefficiency was inconsistent with her status as an employee at Jack Young's and her transfer to petitioner's employ only 30 days prior to her discharge.

At the time Brewton was working at petitioner's Oildale (Roberts Lane) store, petitioner's Chester Street store had not been equipped with automatic labor-saving devices petitioner's other two stores had been equipped with. (Tr. 305.) Therefore, more help was needed at the Chester Street store. To keep down its overhead, petitioner was looking for an employee with sufficient speed to do at its Oildale store in part-time, what Brewton had been doing in full-time there, and still be available to work part-time at its Chester Street store. (Tr. 305-306, 327, 336.) Pappin had the speed to do both jobs in a day. (Tr. 306.) Brewton did not, and at the hearing she did not contend that she had.

There is no inconsistency in Brewton being able to perform satisfactorily in one situation but not in another, any more than in Jack Baldwin being a fairly decent meat cutter but a poor head meat cutter.

Neither Baldwin nor Newton were former Hob Nob employees.

Newton

Norma Newton worked for Hob Nob. Her testimony is that she telephoned William Young regarding a job. He asked her if she could start the next day, and when she said that she was unable to, he asked her to call back "in a couple of days". In response to a question, he said "we have our own union". (Tr. 222.)

Newton claimed that when she later called back, Young said he was Joe Wong and "bawled me out" for calling him. (Tr. 223.) She said that in a later conversation, Young told her that she would have to withdraw from the union. (Tr. 224.)

Disregarding William Young's denial that he ever talked to Norma Newton (Tr. 315-316), no reason is afforded or suggested by the record, and none is advanced by the NLRB, why William Young would say that he was Joe Wong, when he was not, or why he would say that he had his own union, when he did not. (Tr. 316.)

The "evidence" supporting the case for Norma Newton is not only flimsy but patently transparent.

The Single Employer

The NLRB concluded that petitioner and Jack Young's are a single employer within the meaning of the Act. The only substantial evidence is that they are not. The evidence may be summarized as follows:

1. Ownership. Jack Young owns more than 85% of the stock of Jack Young's. He owns none of petitioner's stock. (Tr. 282, 283.)

2. Acquisition. Petitioner's three stores were purchased by Bill Young and Jack Young, Jack Young's sons, as individuals, and they then formed a new corporation to operate the stores. (Tr. 283.)

3. Control. Jack Young, president and chief executive of Jack Young's, is not an officer or director of petitioner and he is not authorized to sign petitioner's checks. (Tr. 284, 291.)

4. Bank accounts, books of account, etc. They are separate. (Tr. 291.)

5. Sales—purchases. Meat is not purchased jointly by the two corporations, and no meat sold by one corporation has ever been paid for by the other. (Tr. 294.)

6. Taxes and licenses. They are paid by and are in the name of petitioner as respects its stores. (Tr. 295-297.)

7. Payment of wages. No employee of petitioner has ever been paid by Jack Young's for work performed at petitioner's stores. (Tr. 295.)

8. Advertising. While a common name is used for advertising, costs are prorated, and this is not uncommon in the retail grocery industry. (Tr. 257, 292-294.)

While William Young may have represented both petitioner and Jack Young's at times in the area of

labor relations, policy at Jack Young's is determined by Jack Young, and Jack Young does not decide petitioner's policy. (Tr. 297.)

Some exchange of employees and some degree of cooperation between two corporations does not amount to integration. See *Malcolm Konner Chevrolet Co.*, 141 NLRB No. 43 (1963); *Carl Rochet d.b.a. Renton News Record,* 136 NLRB 1294 (1962); *Park Plaza Amusement Co.,* 124 NLRB 428 (1959); *American Furniture Co.,* 116 NLRB 1496 (1956); *C. A. Batson Co.,* 108 NLRB 1332 (1954); *Jefferson Co.,* 105 NLRB 202 (1953); and *Clark Thread Co.,* 79 NLRB 542 (1948). See also, *M. Lowenstein & Sons, Inc.,* 150 NLRB No. 66 (1964).

CONCLUSION

For the reasons set forth herein the NLRB Decision and Order should be reversed and set aside.

Dated, Coalinga, California,
July 18, 1966.

Respectfully submitted,
FRAME & COURTNEY,
TED R. FRAME,
Attorneys for Petitioner.

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Ted R. Frame,
Attorney for Petitioner.

(Appendix Follows)

Appendix

Appendix

TABLE OF EXHIBITS

Exhibit	Identification	In Evidence
General Counsel's:		
1(a)-1(y) (formal documents)	Tr. 5	Tr. 5
2 (collective bargaining agreements)	11	12
3 (letter, Specht to Hodson)	12	13
4 (letter, Hodson to Specht)	13	13
5 (letter, Frame to Hodson)	14	14
6 (letter, Hodson to petitioner)	15	15
7 (letter, Frame to Hodson)	15	15
8 (letter, Arak to petitioner)	15	16
9 (letter, Frame to Arak)	16	16
10 (contract of sale)	17	17
11(a)-(b) (Brewton paychecks)	97	99
12(a)-(b) (Brewton paychecks)	97	99
13(a)-(b) (Baldwin paychecks)	98	100
14(a)-(c) (Baldwin paychecks)	164	165
Petitioner's:		
1 (Representation petition)	20	20
2 (letter, Scully to Frame)	20	20
3 (letter, Hob Nob to Union)	73	73
4 (Brewton paychecks)	124	124
5 (Brewton paychecks)	125	125
6 (Brewton paychecks)	125	125
7 (sales volume record)	302	303
8 (list of employees)	302	
Union's:		
1 (newspaper ad)	69	69